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No. 359

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IN THE

Supreme Court of the United States

October Term, 1968

JOHN F. GRAHAM,

Petitioner,

v.

THE HONORABLE HAROLD H. GREENE,
THE HONORABLE CATHERINE B. KELLY,
THE HONORABLE TIMOTHY MURPHY,
DALE C. CAMERON, M.D.,
UNITED STATES OF AMERICA,

Respondents.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the District of Columbia Circuit

PETITION FOR REHEARING

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Washington, D. C. 20009

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Pursuant to Rule 58(2) of the Rules of this Court the petitioner petitions the Court for a rehearing of a denial of a petition for a writ of certiorari. It is certified that this petition is submitted in good faith and not for delay and states substantial grounds available to the petitioner, although not previously presented.

In this petition the petitioner propounds three propositions, to wit: That it is cruel and unusual punishment and a deprivation of civil rights where (1) involuntary medical treatment is imposed on a prisoner accused of but not shown to have committed a crime; (2) involuntary medical treatment is imposed on an individual over the opposition of the individual and/or his nearest of kin; (3) a person is compelled to accept involuntary medical treatment from a physician of a race, religion and/or national origin disparate from that of the person being treated.

I

Although the indictment was eventually dismissed on the Government's motion, the petitioner was imprisoned for six months in the D. C. General Hospital and St. Elizabeths Hospital after he was arrested for mailing threatening communications, and it is cruel and unusual punishment and a deprivation of civil rights where involuntary medical treatment is imposed on a prisoner accused of but not shown to have committed a crime.

In the District of Columbia it is customary, pursuant to 24 D. C. Code §301(a), to impose involuntary medical treatment on persons arrested for misdemeanors and felonies.[1] Indeed, the statute as enacted specifically authorized such treatment. (H.R. Report No. 892, June

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[1] See Brief of Respondents Greene and Kelly in Opposition, page 6, note 3:

> From 1936 [1956?] to 1962, 194 accused felons were committed by General Sessions Judges, under §301(a), to Saint Elizabeths Hospital as incompetent to stand trial. See "Report of the Committee on Problems Connected with Medical Examinations of the Accused in Criminal Cases Before Trial," Judicial Conference of the District of Columbia Circuit, 1964, at 49. (Cont'd)

22, 1955, p. 1.) Testifying before a Senate Subcommittee in favor of H.R. 6585 (S. 2274), later to become 24 D. C. Code §301(a),[2] Dr. Winfred Overholser, then superintendent of St. Elizabeths Hospital, said:

> [If] a person is acquitted by reason of insanity, he will be, not may be, will be sent to St. Elizabeths Hospital, and that may mean quite a long period of confinement. Actually, once patients get to us – and I hope this is not taken wrongly – they are rather inclined to find that possibly they would rather be considered a criminal than a mental case. That has been my experience right through, but I realize that there has been abuse. I suppose there will be abuse of practically any provision. * * * [A]s a matter of fact, most of the patients, nearly all of the patients, we send back to court as competent to stand trial, wish to go back to court. It is very rarely that there is any opposition. * * * I think that this matter of mandatory commitment by reason of insanity is highly desirable. * * * But

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(Cont'd)

According to the 1962 Annual Report, Department of Health, Education and Welfare, of 782 District of Columbia prisoners in St. Elizabeths Hospital as of June 30, 1962, 87 were being held for examination; 248 as mentally incompetent; 296 as not guilty by reason of insanity; 90 under sentence, and 61 as sex psychopaths. Statistics published in the Washington, D.C. *Evening Star*, on March 12, 1961, p. B-4, indicate that while, in 1957, only 7 out of 473 criminal cases in the District of Columbia (1.5%) were disposed of by a finding of not guilty by reason of insanity, by February, 1961, the number had increased to more than 25%.

[2] Hearings on *A Bill to Amend the Act entitled "An Act to Establish a Code of Law for the District of Columbia," Approved March 3, 1901, and for Other Purposes*, Subcommittee on the Judiciary of the Committee on the District of Columbia, United States Senate, S. 2274, June 28, 1955, Vol. 1, pp. 53-55, 57.

> I think that the proviso, if it is known to the defendant, that if he is acquitted, if he is successful in his plea, that he was insane at the time of the act, it is going in itself to reduce substantially the number of false pleadings, if he knows that he will be confined for a wholly indefinite period in a mental hospital, and sometimes that might well turn out to be a good deal longer than the sort of sentence he would get if he were found not insane at the time of the act. * * * [T]he question was raised about jury trial in determining whether or not a person should be sent to the mental hospital as a matter of determining his competency. I am sure that the jury is quite unnecessary for that. * * * This is a preliminary proceeding. It does not go to the issue, of course, to the guilt or innocence of the defendant.[3]

Testifying in favor of the same bill before a House Subcommittee,[4] attorney George L. Hart, Jr. (now a U. S. District Judge), said:

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[3] Cf. *United States v. Pound*, D.C.D.C., Criminal No. 76,028, where the defendant was confined in St. Elizabeths Hospital from December 21, 1945, to May 7, 1958, as incompetent to stand trial after he had been accused of making treasonable broadcasts over Italian radio facilities, the content of which broadcasts was largely a vilification of the Jews designed, according to the indictment, "to create racial prejudice and distrust of the Government of the United States." Dr. Overholser was the St. Elizabeths Hospital superintendent from 1937 to 1962.

[4] Hearings on *A Bill to Amend the Act entitled "An Act to Establish a Code of Law for the District of Columbia," Approved March 3, 1901, and for Other Purposes*, Subcommittee on Crime Investigation, Committee on the District of Columbia, United States House of Representatives, H.R. 6585, June 8, 1955, Vol. 1, pp. 27-28.

> It is also true – and on this all psychiatrists agree – from the moment a person enters a mental hostal he is subject to treatment. You cannot enter a mental hospital and say, "A person is here merely for examination." The moment he walks into the walls of that institution he is subjected to treatment.

Hart recommendations included confinement in St. Elizabeths for observation for "a brief period" of up to six months; no jury trial; mandatory commitment of those found "not guilty" by reason of insanity, and the "mental disease or mental defect" test by which practically anyone the Government wants to imprison can be qualified as mentally ill.

II

The petitioner was ordered committed to St. Elizabeths Hospital although he had not raised an insanity defense and his wife had testified as to his sanity, and it is cruel and unusual punishment and a deprivation of civil rights where involuntary medical treatment is imposed on an individual over the opposition of the individual and/or his nearest of kin.

Although insanity has been a medical problem at least since Asclepiades of Bithynia (124 B.C.-50? B.C.), the profession of medicine has never discovered its cause. Cures have been attempted by whipping, douches, insulin-induced convulsions, surgery drugs and group therapy, but, while some cures have been effected, this seems to have been more by accident than design.[5] Thus, the

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[5] See Franz G. Alexander, M.D., and Sheldon T. Selesnick, M.D., *The History of Psychiatry* (New York: Harper & Row, 1966), pp. 279-296.

treatment of mental ailments is still a matter of trial and error, and the treatment afforded to inmates of public mental institutions is essentially experimentation.

The medical view of experimentation on involuntary subjects was explained by Karl Brandt, M.D., Reich Commissioner for Health and Education, major general in the Waffen-SS, and Hitler's escort physician, who was on trial before a United States Military Tribunal in 1947. Asked whether he regarded experimentation on human beings without their consent as criminal, Dr. Brandt said:

> It depends on what kind of experiments we are talking about. In my opinion the question of consent plays an important part in judging the experiments as a whole — an aggravating part if the experiments are considered criminal. * * * You can call it an experiment even when it is only a matter of testing some newly introduced drug. There is the conviction that it will be helpful, but the final knowledge is lacking. Even such a thing can be called an experiment. * * * In addition, the question of voluntary and involuntary experiments is of psychological significance in the case of a prisoner, as it may be with the insane. * * * There are three aggravating aspects with respect to the question of the criminal element in experiments: their involuntary character; the lack of necessity for them, and the danger involved.[6]

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[6] *United States v. Brandt*, United States Military Tribunals, Nuremberg, Official Record, Case No. 1, Tribunal 1, Volume 8a, pp. 2577-2578:

> Es kommt darauf an, um was fuer Experimente es sich dabei handelt. Die Frage der Zustimmung spielt meiner Meinung nach in der Gesamtbeurteilung der Experimente eine wesentliche Rolle, und zwar in der Beurteilung, wenn

(Cont'd)

At the completion of the trial the Military Tribunal promulgated ten rules to be observed in human experimentation,[7] the first of which stated:

> The voluntary consent of the human subject is absolutely essential. This means that the person involved should have legal capacity to give consent; should be so situated as to be able to exercise free power of choice, without the intervention of any element of force, fraud, deceit, duress, over-reaching or other ulterior form of constraint or coercion; and should have sufficient knowledge and comprehension of the elements of the subject matter involved as to enable him to make an understanding and enlightened decision. This latter element requires that before the acceptance of an affirmative decision by the experimental subject

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(Cont'd)

man das Wort verbrecherisch dabei gebraucht, eine beschwerende. * * * Man kann schon von Experiment sprechen, wenn man ein neu eingefuehrtes Medikament anwendet. Man ist dabei der Ueberzeugung, das hilft, ohne dass man es im letzten genau weiss. Auch so etwas kann schon als Experiment bezeichnet werden; deswegen moechte ich einen Unterschied machen in dem Problem der Fragestellung, die man behandelt. Ausserdem kommt hinzu, dass die Frage Freiwilligkeit und Nichtfreiwilligkeit bezueglich eines Gefangenen schon psychologisch eine Rolle spielt, ebenso in Hinsicht auf Geisteskranke eine Bedeutung haben kann. Man wird daher sich klar sein muessen, wenn man eine solche Frage von vornherein mit verbrecherisch beantwortet, an was fuer einen Versuch es sich dabei handelt. Die erschwerenden Momente in Hinblick Verbrechen allgemein bei Versuchen sind in drei Punkten, naemlich der Nichtfreiwilligkeit, vor allem der Nichtnotwendigkeit eines Versuches und drittens in der Gefaehrlichkeit eines solchen.

[7] *United States v. Brandt*, Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No. 10, Vol. 2, p. 181, *et seq.*

> there should be made known to him the nature, duration, and purpose of the experiment; the method and means by which it is to be conducted; all inconveniences and hazards reasonably to be expected; and the effects upon his health or person which may possibly come from his participation in the experiment.[8]

That doctors practicing at St. Elizabeths Hospital have not always been meticulous in observing these principles is indicated by a passage from *Psychosurgery* by Drs. Walter Freeman and James C. Watts:[9]

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[8] Dr. Brandt's views differ somewhat from those of American doctors. In 1964 it was disclosed that over a ten-year period nearly 300 subjects had been injected with live cancer cells in experiments conducted by the Sloan-Kettering Institute for Cancer Research. Solomon Siegel, executive director of the Jewish Chronic Disease Hospital in Brooklyn, N. Y., where some of the experiments were conducted, said the patients did not know they were receiving injections of live cancer cells; they were told they were being injected with cells to test their resistance to cancer. Of the 22 Jewish Chronic Disease Hospital patients so injected, six died. Defending his failure to disclose the true nature of the experiments to the patients, Dr. Chester M. Southam, who directed the experiments for the Sloan-Kettering Institute, said: "It is not necessary to present [the subject] with what you feel are inconsequential data and [it is] unethical to ram down his throat information which is detrimental to his condition." (New York *Times*, January 21, 1964, p. 31; January 26, 1964, p. 70.) Although the petitioner does not intend to press the point, it is, nevertheless, a question as to whether the St. Elizabeths doctors, in administering a newly-introduced drug to the petitioner with 26 possible side-effects undisclosed to the petitioner without the petitioner's or his wife's consent and without the sanction of a court of proper jurisdiction, were guilty of criminal assault.

[9] Walter Freeman, M.D., and James C. Watts, M.D., *Psychosurgery, In the Treatment of Mental Disorders and Intractable Pain* (Springfield, Ill.: Charles C. Thomas, 1950), pp. 66-67.

Often patients with obsessive tension states seek prefrontal lobotomy in the belief that it is the only thing that can possibly relieve their suffering. Women with involutional depression feel hopeless about everything, including the possibility of benefit from operation, and require a great deal of persuasion to get them to enter the hospital. Negative suggestion is often helpful. We tell them about the benefits of the operation and assure them that they are not sick enough to need it. Many of our schizophreincs are confused and disorganized and do what they are requested without asking why. Some of the patients who are brought to us are unwilling to follow any suggestions and require a hypodermic of morphine or electfoshock to quiet them enough to get them to enter the hospital. * * * * [A] patient (Case 238) was brought to the George Washington Hospital in shackles by ambulance from the midwest, where he had been a difficult patient for eight years. He had a fiery red beard and red hair, and one leg amputated at the midthigh. He was cursing so loudly and waving his stump so violently that the special nurse who was waiting to go on duty refused to take the case and the superintendent of the hospital refused to admit the patient. We were unable to persuade them to change their minds, so the patient was transferred immediately to the psychopathic unit at the Gallinger Municipal Hospital and then to St. Elizabeths where we performed a lobotomy in May, 1944.

III

Although the petitioner is white, Anglo-Saxon, Protestant (WASP), the petitioner was subjected to treatment by Jewish physicians, and it is cruel and unusual

punishment and a deprivation of civil rights where a person is compelled to accept involuntary medical treatment from a physician of a race, religion and/or national origin disparate from that of the person being treated.

A cherished right of American citizenship is the right to select one's own physician. No professional relationship is more intimate than that between physician and patient, and the patient's confidence in the physician is an important element in the patient's restoration to health. In a Brookings Institute study[10] Herman M. Somers and Anne R. Somers said:

> The physician's relation to [death] – however helpless he in fact may be – has endowed him, in the eyes of centuries of patients, with an aura of mystery. To the extent that the physician identifies himself with this priestly role and takes on himself the burden associated therewith, or at least appears to do so through the gravity of his personal demeanor and behavior, his supra-scientific role continues to be respected and perpetuated, reinforcing in the eyes of individual patients and society at large his status as a dispenser of increasingly scientific medicine.

Because of the priestly role in which patients see their doctors, the right of a patient to select a doctor is even more vital than the right of selecting his friends. In 1961, Dr. Leonard W. Larson, president of the American Medical Association, told the Congressional Committee on Ways and Means:[11]

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[10] Herman M. Somers and Anne R. Somers, *Doctors, Patients and Health Insurance* (Washington, D. C., The Brookings Institute, 1961), p. 460.

[11] Hearings on *Health Services for the Aged Under the Social Security Insurance System,* Committee on Ways and Means, United States House of Representatives, first session on H.R. 4222, August 2, 1961, Vol. 3, p. 1346.

> It is the patient, and his ability to choose freely, that exact the utmost from the doctor-patient relationship. The physician who does not possess the confidence of his patient is handicapped in his effort to cope with disease. But so long as the patient is free to seek professional treatment without restraint, he can quickly find the physician in which he does have confidence. Given that confidence, a doctor's skill can sometimes surmount shortcomings in the facilities and resources available to him. * * * It is axiomatic that first-rate medical care must be appropriate to the needs of the patient – medically, socially, economically and psychologically.[12]

It can be stated as a general rule that a French patient will have more confidence in a French physician than in a German physician; a Hindu patient in a Hindu physician than in a Catholic physician, and a Negro patient in a Negro physician than in a Caucasian (honky) physician. This is no irrational prejudice, for it can be presumed that the French physician has greater empathy with the French patient's emotional responses than the German physician; the Hindu with the Hindu and the Negro with the Negro.

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[12] Cf. Thomas S. Szasz, M.D., *Psychiatric Justice* (New York: The Macmillan Company, 1965), p. 36. In respect to the practice of allowing the prosecution (or the court) to raise the question of the defendant's competence to stand trial, Dr. Szasz said:

> [T]he defendant is not a "patient", the prosecutor and his psychiatrists are not his "doctors". The relationship between the defendant and the state (and its representatives) is antagonistic, not cooperative. The attempt to make it appear cooperative – such as forcing the defendant to submit to psychiatric examination by agents of the state – is simply a strategic maneuver by the government to render its opponents impotent. It is a symptom of despotism – of the worst kind.

During his detention at St. Elizabeths Hospital the petitioner received involuntary medical treatment almost exclusively from a Jewish doctor.[13] While the petitioner is primarily of Anglo-Saxon stock, born in America of American-born parents, and by religion an Episcopalian, the physician who treated the petitioner at St. Elizabeths is racially and culturally Jewish, born and largely educated in Germany.

Contrary to those who seek an amalgamation of race and religion, the petitioner suggests that racial and religious prejudice is socially desirable and necessary to the evolutionary process; that racial and religious conflicts crystallize the cultural values of the protagonists, and that persecution strengthens rather than weakens those who are persecuted. Necessary, however, as this prejudice may be to the evolutionary process, it is not conducive to the restoration of health, and, in fact, where there

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[13] The petitioner was arrested following a futile gesture to avenge his wife whose daughter had been appropriated by another woman. In a Christian culture nothing is more sacred than motherhood (as witness the Marianists), a concept which, having no counterpart in Judaism or Jewish tradition, is presumably incomprehensible to Jewish judges and psychiatrists. Jewish leaders (Moshe Sharett, Louis D. Brandeis *et al.*) appear to agree that "Jewishness" (*Yiddeshkeit*) is definable; it consists of any one or a combination of several factors not shared by gentiles: *e. g.* adherence to Judaism, advocacy of Zionism, observance of Jewish dietary laws, racial identification with Yemenites and Kurds. "The highest point of a people's development," said Hegel, "is the rational consciousness of its life and conditions, the scientific understanding of its laws, its system of justice, its morality." Jewish writers have noted that the search for national, religious and racial consciousness tends to make the Jew a foreigner in any land in which he lives; he is less anxious to absorb (and be absorbed by) the culture of his adopted land than to impose his culture on others. Often the result is to obstruct the development of the people among whom he lives and to obfuscate the understanding of the people's own laws, system of justice and morality.

is antipathy between the physician and patient, it may have the opposite effect. Thus, where, as in the case of the petitioner, a gentile prisoner is compelled by a Jewish judge and a Jewish prosecutor to accept involuntary medical treatment from Jewish physicians; where involuntary medical treatment is imposed on the prisoner accused of but not shown to have committed a crime, and where involuntary medical treatment is imposed on the prisoner by the Government over his own and his wife's opposition because a medical expert employed by the Government considers him incompetent to stand trial, the prisoner is patently being subjected to cruel and unusual punishment and deprived of his civil rights.

The petitioner submits that every American citizen, Jew or gentile, white or black, sane or insane, accuser or accused, is guaranteed the privileges and immunities of the Constitution, and the petitioner further submits that discrimination against a member of one race by members of another race is unconstitutional, un-American, and contrary to law.

Respectfully submitted,

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